IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

DECEMBER TERM, 1900.

HENRY SMITH *v.* HAMAKUA MILL COMPANY, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED SEPTEMBER 28, 1900. DECIDED JANUARY 18, 1901.

FREAR, C.J., AND PERRY, J.

The probate court did not have jurisdiction in 1871 to declare the heirs of a decedent in a proceeding instituted for that purpose as distinguished from a proceeding for the distribution of property, nor did it have jurisdiction to decree a distribution of real property.

An adjudication of a question of heirship or relationship in a proceeding in probate for a distribution of personal property is not binding in a subsequent action of ejectment with respect to real property as to one who did not appear as a party or claimant, though she appeared as a witness, in the probate proceedings.

OPINION OF THE COURT BY FREAR, C.J.

This is an action of ejectment for an undivided one-fourth of the ahupuaa of Koholalele, situated at Hamakua, Hawaii, and covered by Royal Patent 4527, L. C. A. 26B, to Kailakanoa, now called Kailikanoa. The plaintiff claimed title by conveyance from Keala Koiula and Aalaioa and set up that these had title by descent from Kapehe, she by descent from Huakini, and he by descent from Kailikanoa, the awardee and patentee.

The defendant pleaded in bar a former judgment in substance that on the 17th day of January, 1871, Chief Justice Allen, of the Hawaiian Supreme Court, sitting in probate, decreed, after a hearing on the petition of P. Nahaolelua, administrator of the estate of Kailikanoa, for allowance of his accounts and a declaration of the heirs of the estate, that the accounts be allowed and the administrator discharged, and that said P. Nahaolelua as half brother, and Hoomana as wife, were the heirs of Huakini, and therefore in effect that Kapehe was not an heir of Huakini. The proceedings in the matter of the estate of Kailikanoa are made a part of the plea.

The plaintiff replied denying, among other things, that P. Nahaolelua was the duly appointed administrator of the estate of Kailikanoa, that notice of the hearing of his petition was given by publication or otherwise to Kapehe, that Kapehe was a party or claimant at the hearing, that any valid decree was made, or that Kapehe's claim of heirship was disallowed, and alleging in substance, among other things, that Kailikanoa died in 1856, and that the real property then descended to Huakini, that Huakini was appointed administrator by the Supreme Court in 1857, and that after his death P. Nahaolelua was appointed administrator in his place by a Circuit Judge of the Island of Hawaii in 1862, that there was then no personal property of Kailikanoa to be administered upon and no unpaid debts, that the Circuit Judge had no jurisdiction to make such appointment, both because there was no personal estate and because the Supreme Court had taken jurisdiction, that there was no petition for a declaration of the heirs of the real estate, that there was no petition for a declaration of the heirs of Huakini, and that therefore the decree as to his heirs was void because not responsive to the petition which was for a declaration of the heirs of Kailikanoa, that Kapehe was not a party to the proceedings, that she was a married woman, that her address was known to P. Nahaolelua, but that no personal service was made on her; that the published notice did not conform to the rules of court in that the last publication was less than two weeks previous to the day of hearing; that P. Nahaolelua was not, but that Kapehe was of the blood of Kailikanoa, and the plaintiff claims that the Supreme Court had no jurisdiction over Kapehe, or to approve the accounts of P. Nahaolelua, as administrator, or over the real estate, or to declare the heirs of Kailikanoa or of Huakini.

The defendant filed a joinder to the effect that the plea was sufficient, notwithstanding the replication.

In brief, the defendant pleads a former adjudication adverse to the heirship of Kapehe through whom the plaintiff claims, and the plaintiff replies in substance that there was no such adjudication binding on Kapehe.

It will be unnecessary to consider all the questions raised in regard to the validity of the proceedings had in the matter of the estate of Kailikanoa.

The Probate Judge had no jurisdiction either to declare the heirs of Kailikanoa in a direct proceeding instituted for that purpose as distinguished from a proceeding for the distribution of the estate or a portion thereof (see as to this distinction *Mossman v. Hawaiian Government*, 10 Haw. 426, 432), or to make a distribution of the real estate.

Consequently, assuming that the petitioner was the duly appointed administrator of Kailikanoa's estate, that there was in his hands personal estate of the decedent to be distributed, that there was a sufficient petition for its distribution and a sufficient notice of the hearing, that the Chief Justice had jurisdiction to act, that an adjudication of heirship as to the personal property was made and that such adjudication is binding as to its subject matter, the personal property, the question remains whether such adjudication of heirship in probate with respect to the personal property is binding upon the plaintiff in this action of ejectment with respect to the real property.

Whether it would be binding if Kapehe, through whom the plaintiff claims, appeared as a party in the probate proceedings is a question upon which there might be some difference of opinion (see *Mossman v. Hawaiian Government, supra*, 432), but that it would not be binding unless she did appear as a party in those proceedings is settled by the decision in that case, and in our opinion she did not so appear.

Let us assume that she could appear alone and be bound as a party, though she was a married woman. The proceedings occurred before the passage of the Married Women's Act. The record makes no mention of her husband, although it shows that Hanakaulani Holt, who was a party, and who claimed under the same relationship as that in which Kapehe stood, was associated with her husband in those proceedings.

The record does not show that Kapehe appeared as a party. The clerk's minutes of December 31, 1870, the first day of the hearing show, "Petitioner is present with R. G. Davis. H. Thompson for Mrs. Holt. W. C. Jones for John A. Simmons." There was no reference to Kapehe. When the accounts had been disposed of and the matter of heirship came up, according to the minutes, counsel stated the claims of Simmons, Mrs. Holt and the petitioner, but did not state any claim of Kapehe. The minutes of January 5, 1871, to which day the matter had been continued after some testimony had been taken, show, "Hoomana (w.) appears and says—she claims through her husband."

There is no reference whatever in the record of any appearance or claim of or on behalf of Kapehe.

True, she appeared as a witness, having been called as such by the petitioner, and recalled by counsel for Mrs. Holt, and testified as to matters of relationship. But she made no claim for herself. The fact that she was called as a witness by one who was claiming adversely to her interests tends to support the view that she was present not as a party or claimant, but merely as a witness. Mere presence in court or acting as a witness would not constitute appearance as a party, so as to bind her with respect to matters not the direct subject of the particular proceedings even though she might have appeared as a party in interest or of record in such proceedings if she had wished to so appear. *George v. Holt*, 9 Haw. 49; *Wright v. Andrews*, 130 Mass. 149; *Schroeder v. Lahrman*, 26 Minn. 87. In *Wright v. Andrews*, the defendant was held not bound by a judgment in a former suit even in respect to the particular subject matter involved in the former suit, because he was not served with notice and did not appear as a party, though he was expressly named as a defendant, and his property was involved and he appeared as a witness. So here Kapehe might be held bound as to the particular property involved on the assumption that she had notice through publication, but she could not be held bound as to other property on the ground that she appeared as a witness, so long as she did not appear as a party or claimant.

It is true also, that the minutes show that the attorney, Mr. Thompson, said in his argument, "We claim the rightful heirs are Mrs. O. Holt and Kapehe." This is not sufficient, at least, in view of the rest of the record, to show that Kapehe was a party, or that Mr. Thompson was acting as her attorney. Inasmuch as Mrs. Holt stood in the same relation as Kapehe to the decedent, so that if one were heir the other would be also, as the undisputed evidence showed, the attorney could not but have mentioned the one, Kapehe, in urging the claim of the other, Mrs. Holt, whose attorney he was. He was entered on the minutes as counsel for Mrs. Holt alone. He signed the notice of appeal, "Henry Thompson, attorney for H. Holt and her husband, Owen J. Holt," and his motion for a jury trial was signed, "Hanakaulani Holt and Owen J. Holt, by their attorney, Henry Thompson." There is nothing to show that he stated the claim for Kapehe by her authority, or that she knew that he stated it at all.

The Chief Justice in his opinion speaks of "several persons claiming," referring to all the claimants, but speaks of the "claimant," not "claimants," when referring to the argument of counsel for Simmons or Mrs. Holt, it does not clearly appear which. On appeal, *Estate of Kailikanoa*, 3 Haw. 461, the full court says: "Mrs. Holt is not the sole heir in any event, as Kapehe's claim is of like degree," but this was apparent on the evidence, and does not necessarily show that Kapehe presented or made any claim, and on the previous page, in the statement of the case, which was prepared or revised by the Justice who wrote the opinion, we find these significant words with reference to the decree appealed from: "This decree was opposed by Mrs. Hanakaulani Holt and by John A. Simmons. From this decree, Mrs. Holt's counsel, February 4th, filed a notice of appeal." Kapehe was not mentioned in this connection.

The exceptions to the ruling of the Circuit Court sustaining the plea in bar are sustained, the said ruling is reversed and the case remanded to the Circuit Court for further proceedings conformable with the foregoing opinion.

Lyle A. Dickey for plaintiff.
C. Brown for defendant.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

DECEMBER TERM, 1900.

NETTIE L. SCOTT *v.* J. K. NAHALE.

APPEAL FROM CIRCUIT JUDGE, THIRD CIRCUIT.

SUBMITTED JANUARY 7, 1901. DECIDED JANUARY 22, 1901.

FREAR, C.J., AND PERRY, J.

In an action for trespass of cattle, *held*, that there was evidence to support the finding of fact that defendant was not the owner of the trespassing cattle at the time of the trespass.

OPINION OF THE COURT BY PERRY, J.

This is an action at law, instituted in the District Court of North Kona, Hawaii, wherein the plaintiff claims of the defendant the sum of one hundred and fifty dollars as damages for trespass, alleged to have been committed by cattle belonging to defendant on certain lands of the plaintiff at Holualoa in said North Kona, from the first day of June, 1892, to the twenty-fourth day of April, 1893. The District Magistrate rendered judgment for the defendant, from which judgment plaintiff appealed to the Circuit Judge of the Third Circuit, at chambers.

The latter court also found for the defendant. Plaintiff's appeal to this court is "from the judgment entered in said action to the Supreme Court of the Republic of Hawaii on the ground that the judgment and the decision on which said judgment is based, are contrary to the law, contrary to the evidence, and contrary to the weight of the evidence."

Under Chapter 109 of the Laws of 1892, "appeals shall be allowed from all decisions, judgments, orders or decrees of Circuit Judges in chambers to the Supreme Court," except in certain cases, of which that at bar is not one. Act 44 of the Laws of 1898, which permits an appeal from the decision of any District Magistrate, in any case, civil or criminal, to the Circuit Judge of the same circuit, at chambers, provides, however, that "in all such cases so appealed no other or further appeal on any question of fact shall be allowed." It is plain, therefore, that in the case at bar the appeal to this court can be solely on questions of law. Whether or not it is necessary that the points of law on which a ruling is desired should be set forth in such an appeal (see *Castle v. Bowler*, 8 Haw. 866), need not be now determined, for, assuming that that is an essential, the notice of appeal in this case is not defective. The point of law is stated, to wit, whether or not there is any evidence to support the decision of the trial court.

The gist of the decision filed by the Circuit Judge is contained in the words, "the defendant has convinced the court that he was not the owner of those cattle" (i. e., the cattle which committed the trespass complained of) "during the time alleged, from the first day of June, 1892, to the twenty-fourth day of April, 1893." It is with this finding that fault is found, the contention of counsel for the appellant being that there is no evidence to support it.

Plaintiff's title to the land was admitted, nor was it disputed that *some* cattle had trespassed on her land; but on the question of whether or not any of said cattle belonged to the defendant during the period named in the declaration, there was evidence on both sides,—evidence that was highly contradictory. Defendant gave positive testimony that during the period stated he did not own any of the cattle that were running on the land in question, and that during that time all of the cattle which he did own were at Kahaluu. Although there was other evidence, as well of the defendant himself, as of other witnesses which might tend to throw discredit on his testimony first above referred to, the decision cannot be set aside. The questions of the credibility of the witnesses and of the weight of their evidence were for the trial court to pass upon, and it accepted the defendant's statement above mentioned. No further trial on the facts can be had.

The appeal is dismissed.

Holmes & Stanley for plaintiff.
Achi & Johnson for defendant.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

DECEMBER TERM, 1900.

W. R. CHILTON *v.* JONATHAN SHAW, Tax Assessor.

APPEAL FROM TAX APPEAL COURT, ISLAND OF OAHU.

SUBMITTED DECEMBER 31, 1900. DECIDED JANUARY 19, 1901.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A proper assessment of one lot cannot be reduced on appeal merely because certain other lots in the vicinity have been assessed too low in comparison,—the assessor having acted in good faith and not having assessed other property in general at a lower rate.

Property of the full cash value of at least $35,000. but leased at $185. a month under a ten year lease about to expire should not be assessed on the eight-year rental rule, as that would be "manifestly unfair or unjust." Civ. L. Sec. 320.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from the assessment of the business lot and building on the westerly corner of Fort and King streets, and a residence lot and building on the southeasterly side of Miller street, in the city of Honolulu.

The first mentioned property was returned at $25,000. The Assessor assessed it at $35,000. The Tax Appeal Court sustained the Assessor's valuation. Taxes were paid on a compromise valuation of $27,500 the year before. The assessment in question is that for January 1, 1900. At that time the property was under a ten-year lease at a rental of $166.50 a month for the first five years, and $185 the last five years. The lease would expire in about one year. There is evidence tending to show that a new lease was desired at $300 a month, but that the appellant declined to make a new lease until the expiration of the old. In the early part of the year previous a responsible party wished to buy the property for $35,000. This party testified that the value had increased by January 1, 1900. The appellant replied that he would not sell for $50,000. He testified that he valued the property at between $70,000 and $80,000. The lot is about thirty-three feet square, according to one witness, and about 32½ x 37, according to another, and is covered by a two-story building. It is perhaps as valuable a corner as there is in the city, centrally located and at the juncture of the two main street car routes. The lot adjoining on Fort street, which is slightly larger than this, but is not a corner lot, was sold in the early part of the year previous for $30,000., and was assessed on January 1, 1900, at $25,000. The street frontages of a number of other properties in the vicinity, and the assessments placed thereon for the same date, as well as for the previous year, were put in evidence, namely, the property adjoining on Fort street already mentioned, the Hall (Austin) corner opposite, the McIntyre corner diagonally opposite, the Lewers & Cooke (Austin) property adjoining the Hall property on Fort street, the Brewer property on the corner of Fort and Hotel streets, the Mott-Smith property on another corner of the same streets, the McInerny, Cummings, Judd and Campbell properties on the four corners of Fort and Merchant streets, the last named property also extending down Fort and around the corner on Queen street, the Spreckels property, comprising most of the block bounded by Fort, Queen, Alakea and Merchant streets, the Nott, Cunha (Wall, Nichols Co.) and Von Holt properties on King street, between fort and Bethel streets. Of these assessments some seem to be not materially out of proportion to the assessment placed on the property in question so far as we can judge from the meager facts before us, while others appear to be too low as compared with this assessment, some of them glaringly so.

The statute (Civ. L., Sec. 820) provides that "all real and personal property * * * shall be assessed * * * for its full cash value," with a proviso that combined properties shall be assessed as a whole, and a further proviso "that when any real estate or house is leased or rented, the sum of eight years' rental thereof shall be the assessment value of such real estate or house, unless such valuation shall be manifestly unfair or unjust."

A valuation at eight years' rental in this case would be manifestly unfair and unjust. It would amount to $17,760. Such is apt to be the case with property leased years ago at a smaller rental than can now be obtained, especially if the lease is about to expire. Since, then, this case does not fall within the proviso which prescribes the eight-year rental method, it must be governed by the main rule, which requires the property to be assessed at its full cash value, and we cannot say on the evidence that its full cash value is less than $35,000, the amount at which it was assessed.

The question is whether the appellant's property is assessed too high, not whether some other properties are assessed too low. If it appeared that other properties generally were assessed at a lower rate, it might be proper to assess this at the same rate. But we cannot reduce the assessment in this case merely because some other properties have been assessed too low, through a failure in judgment on the part of the assessor. It is conceded that he acted in good faith in the present instance. But we may well repeat what was said in substance in *Tax Assessment Appeals*, 11 Haw. 242, that great care should be taken to place proper valuations upon different properties regarded in comparison with each other, as well as regarded separately, and that discrimination between different taxpayers, unless based on real differences in circumstances, is even more objectionable than general excessive taxation. In this connection we may remark that the assessors appear not always to understand the proper course to pursue where a sale or offer to purchase has been made of a particular property, or where there has been a refusal to sell at certain figures. For special reasons one may be willing to pay more than the general market value. For other reasons one may be unwilling to accept a certain sum, even though greatly in excess of the market value. In most cases a sale of one property throws almost as much light on the values of neighboring properties as upon that of property sold. There may be no reason why the assessment of the property sold should be raised any more than the assessments of the neighboring properties should be raised. And sometimes the assessments of properties in general in a particular neighborhood should be raised or lowered, where they have not been raised or lowered, in the absence of any sale, as well as after or in consequence of a sale.

The eight-year rental proviso, on which the appellant mainly relies, was no doubt adopted as a convenient rule for arriving